Credit Corp (M) Bhd v Hasmah bte Salleh & Ors

HIGH COURT (SANDAKAN) — SUIT NO S 22–09 OF 1993
LINTON ALBERT JC
6 OCTOBER 2004

Banking — Loan agreement — Deed of assignment — Whether loan agreement conditional on purchasers executing assignment of property — Whether renders loan agreement a charge agreement or anything resembling memorandum of charge

Limitation — Assignment — Deed of assignment — Action commenced more than six years after last payment of interest — Whether claim statute-barred — Sabah Land Ordinance s 20

The defendants entered into an agreement with the plaintiff dated 14 February 1985 ('the loan agreement') to secure a loan amounting to RM71,600 ('the loan'), to finance the purchase of one unit of single storey terrace house known as Lot 1, Block 26, Taman Tinosan, Mile 4 1/2, North Road, Sandakan ('the said property') from one United Lands Development Sdn Bhd ('the vendor'). Under the loan agreement, the defendants were also required to execute an assignment ('the deed of assignment') of the property in favour of the plaintiff. The loan was progressively released to the vendor until 1986 when the housing project was abandoned. At about the same time the defendants had, in breach of the loan agreement, begun to default in making payment of interest calculated on the amount already disbursed by the plaintiff. The plaintiff commenced proceedings against the defendants to recover the loan and interest therein on 8 January 1993. The sum claimed was RM109,210.35 together with agreed interest thereon at 10% per annum from 1 October 1992 to date of judgment and thereafter 8% per annum until full settlement.

Held, dismissing the application with costs:

(1) Although article 101 of the schedule to the Sarawak Limitation Ordinance is in pari materia with Item 101 of the Sabah Limitation Ordinance, reliance on *Kong Ming Finance Corporation v Lee Shin Koon* [1994] 1 CD 261 is misplaced. The fact that the loan agreement here refers to and is conditional on the defendants executing an assignment of the property in favour of the plaintiff does not make the loan agreement a charge agreement or anything remotely resembling a memorandum of charge and all the more so, because the deed of assignment did not feature at all in the endorsement of claim nor was evidence adduced at the trial. (see para 7).

(2) Section 20 of the Sabah Land Ordinance substitutes the date of the last payment of interest by the defendants for the date of the loan agreement. It is indisputable that the last payment of interest was made by the defendants on 21 July 1986. Clearly, the plaintiff's action which was commenced on 8 January 1993 is statute-barred because it was commenced more than six years after the last payment of interest by the defendants (see para 9).

[**Bahasa Malaysia summary**

Defendan-defendan telah memasuki satu perjanjian dengan plaintif bertarikh 14 Februari 1980 ('perjanjian tersebut') untuk mendapatkan satu pinjaman berjumlah RM71,600 ('pinjaman tersebut'), bagi membiayai pembelian satu unit rumah teres satu tingkat dikenali sebagai Lot 1, Block 26, Taman Tinosan, Mile 4 1/2, North Road, Sandakan ('hartanah tersebut') daripada United Lands Development Sdn Bhd ('penjual'). Di bawah perjanjian pinjaman, defendan-defendan juga dikehendaki menyempurnakan satu penyerahhakan ('suratikatan penyerahhakan') hartanah tersebut kepada plaintif. Pinjaman tersebut telah dilepaskan secara berperingkat kepada penjual sehingga tahun 1986 apabila projek perumahan telah terbengkalai. Pada masa yang sama, defendan-defendan, dalam kemungkiran perjanjian pinjaman, telah mula ingkar untuk membuat pembayaran faedah yang dikira atas jumlah yang telah dikeluarkan kepada plaintif. Plaintif telah memulakan prosiding terhadap defendan-defendan untuk mendapatkan semula pinjaman tersebut berserta faedah-faedah pada 8 Januari 1993. Jumlah yang dituntut adalah RM109,210.35 berserta faedah-faedah yang dipersetujui pada kadar 10% setahun bermula dari 1 Oktober 1992 sehingga tarikh keputusan dan seterusnya 8% setahun sehingga penyelesaian penuh.

Diputuskan, menolak permohonan dengan kos:

(1) Walaupun artikel 101 Jadual Ordinan Had Sarawak adalah pari materia dengan Butir 101 Ordinan Had Sabah, pergantungan kepada *Kong Ming Finance Corporation v Lee Shin Koon* [1994] 1 CD 261 telah disalah letak. Fakta bahawa perjanjian pinjaman di sini merujuk kepada dan dengan syarat bahawa defendan-defendan menyempurnakan penyerahhakan hartanah tersebut kepada plaintif tidak menjadikan perjanjian pinjaman satu perjanjian gadaian atau apa-apa yang hampir menyerupai memorandum gadaian dan lebih-lebih lagi, kerana suratikatan penyerahhakan tidak menyerupai langsung di dalam pengindorsan tuntutan ataupun ada keterangan yang dikemukakan semasa perbicaraan (lihat perenggan 7).

(2) Seksyen 20 Ordinan Tanah Sabah menggantikan tarikh akhir pembayaran faedah oleh defendan-defendan untuk tarikh perjanjian pinjaman. Tidak boleh dipertikaikan lagi bahawa pembayaran akhir faedah telah dibuat oleh defendan-defendan pada 21 Julai 1986. Adalah jelas, tindakan plaintif yang bermula pada 8 Januari 1993 adalah dihalang oleh statut kerana ia telah dimulakan lebih dari 6 tahun selepas pembayaran terakhir faedah oleh defendan-defendan (lihat perenggan 8).]

Cases referred to

Kong Ming Bank Berhad v Sim Siok Eng [1982] 2 MLJ 205 (refd)
Kong Ming Finance Corporation v Lee Shin Koon [1994] 1 CD 261 (refd)

Legislation referred to

Sabah Land Ordinance s 20, item 95
Sabah Limitation Ordinance (Cap 72) items 39, 41, 45, 95, 101
Sarawak Limitation Ordinance schedule, art 101, item 94

Liew Ting Ting (Chin Lau Wong & Foo) for the plaintiff.
Gabriel Ho (Gabriel & Co) for the defendants.

Linton Albert JC:

[1] The defendants obtained a loan of RM71,600 ('the loan') from the plaintiff to finance the purchase by the defendants of one unit of single storey terrace house known as Lot 1, Block 26, Taman Tinosan, Mile 41/2, North Road, Sandakan ('the property'). The defendants, therefore, entered into an agreement with the plaintiff dated 14 February 1985 ('the loan agreement') to secure the loan. Under the loan agreement the defendants were also required to execute an assignment ('the deed of assignment') of the property in favour of the plaintiff. The defendants had purchased the property from one United Lands Development Sdn Bhd ('the vendor') under a sale and purchase agreement dated 16 April 1984. The property was part of a housing project carried out by the vendor who undertook completion within 24 months from the date of the sale and purchase agreement with the defendants. The loan was progressively released to the vendor until sometime in 1986 when the vendor abandoned the housing project and by then a total of RM62,650 had been released to the vendor. At about the same time the defendants had, in breach of the loan agreement, begun to default in making payment of interest calculated on the amount already disbursed by the plaintiff. A series of written demands from the plaintiff to the defendants ensued beginning with the one dated 4 January 1986 (exh P4) and the last dated 6 January 1987. The plaintiff commenced proceedings against the defendants to recover the loan and interest therein on 8 January 1993. The sum claimed was RM109,210.35 together with agreed interest thereon at 10% per annum from 1 October 1992 to date of judgment and thereafter 8% per annum until full settlement.

[2] Learned counsel for the defendants, Mr Gabriel Ho, contended that the plaintiff had failed to establish its claim for RM109,210.35 and devoted a large part of his written submission subjecting the plaintiff's evidence to critical scrutiny to support his contention but which was, in my view, without merit. I agree with the submission of Learned Counsel for the plaintiff, Miss Liew Ting Ting that the admission to that effect by defendants in their pleaded defense discharged the plaintiff of the requirement to adduce evidence to prove that, which had been admitted. Paragraph 1 of the defense is confined to the defendants' denial that the sum of RM 109,210.30 is 'payable' to the plaintiff and paragraph 6 clearly suggests an admission as the defendants seek to set off a sum of RM8,950 against the plaintiff's claim which is RM109,210.35.

[3] I also find that the alleged infirmities of the plaintiff's endorsement of claim made by learned counsel for the defendants are without merit. The defendants' response in their defense belies any suggestion that the endorsement of claim lacks clarity or precision.

[4] I shall now consider the defendants' plea that the plaintiff's claim is statue barred. The defendants contend that the limitation period applicable

under the Sabah Limitation Ordinance (Cap 72) is under one of the following:

Item 39

Description of Suit	Period of Limitation	Time from which period begins to run
For money payable for money lent	Three years	When the loan is made

or

Item 41

Description of Suit	Period of Limitation	Time from which period begins to run
For money lent under an agreement that it shall be payable on demand	Three years	When the loan is made

or

Item 45

Description of Suit	Period of Limitation	Time from which period begins to run
For money payable for interest upon money due from the defendants to the plaintiff	Three years	When the interest becomes due

or

Item 95

Description of Suit	Period of Limitation	Time from which period begins to run
For compensation for the breach of a contract in writing	Six years	When the period of limitation would begin to run against a suit brought on a similar contract not in writing

[5] The plaintiff, on the other hand, contends that Item 101 applies. Itreads as follows:

Item 101

Description of Suit	Period of Limitation	Time from which period begins to run
To enforce payment of money charged upon immovable property	Twelve years	When the money sued for becomes due

[6] Learned counsel for the plaintiff contends that because the loan agreement is conditional upon and refers to an assignment of the property by the defendants, the loan agreement is, therefore, a charge agreement and Item 101 clearly applies. Miss Liew relies on *Kong Ming Finance Corporation v Lee Shin Koon* [1994] 1 CD 261 where the plaintiff granted a loan to the defendant and as security for the loan the defendant executed a Memorandum of Charge whereby two parcels of land were charged to the plaintiff and Steve L.K. Shim, 1 (as he then was) held that the case was:

> '… an action to enforce payment of money charged upon immovable property. It falls squarely within the confines of article 101 of the Schedule to the Limitation Ordinance (Cap.49) where the period of limitation is 12 years from the time when the money sued becomes due.'

[7] With respect, I am of the view that although article 101 of the schedule to the Sarawak Limitation Ordinance is in pari materia with Item 101 of the Sabah Limitation Ordinance, reliance on *Kong Ming Finance Corporation v Lee Shin Koon* is misplaced. The fact that the loan agreement here refers to and is conditional on the defendants executing an assignment of the property in favour of the plaintiff does not make the loan agreement a charge agreement or anything remotely resembling a Memorandum of Charge and all the more so, because the deed of assignment did not feature at all in the endorsement of claim nor was evidence adduced at the trial.

[8] Clause 4.3 of the loan agreement is as follows:

> Notwithstanding any provisions herein, the Borrowers hereby undertakes to pay and discharge to the Lender on demand all sums of money which are now or shall from time to time hereafter be due or owing by the Borrowers in connecting with or arising out of the Loan extended to the Borrowers herein.

[9] It stands to reason, therefore, that Item 41 of the Sabah Limitation Ordinance applies because cl 4.3 requires payment of money due or owing by the defendants on demand. Hence, the limitation period in the present case is three years from the time when the loan is made. Section 20 of the Sabah Land Ordinance substitutes the date of the last payment of interest by the defendants for the date of the loan agreement. It is indisputable that the last payment of interest was made by the defendants on 21 July 1986. Clearly, the plaintiff's action which was commenced on 8 January 1993 is statute-barred. Even if the present case is akin to the situation in *Kong Ming Bank Berhad v Sim Siok Eng* [1982] 2 MLJ 205 where the appellant bank had given unsecured overdraft accommodation to the respondent and subsequently

in order to increase the overdraft facility the respondent charged his lands, the Privy Council held that Item 94 of the Sarawak Limitation Ordinance was applicable and Item 94 being identical to item 95 of the Sabah Land Ordinance, the plaintiff's action would still be statute-barred because it was commenced more than six years after the last payment of interest by the defendants.

[10] I do not think that the disbursement of the balance of the loan amounting to RM8,950,00 by the plaintiff to a third party is of any consequence. No matter how well-intentioned the plaintiff was in disbursing the RM8,950 to a third party to facilitate completion of the housing project abandoned by the vendor, the payment was not made pursuant to the loan agreement or with the consent and approval of the defendants. In any event, the payment was made long after the loan agreement was no longer subsisting, it being painfully apparent that the loan agreement was put to an end when subsequent to the last payment made by the defendants they continued to default in making payment of interest and the plaintiff had by their letter dated 6 January 1987 demanded payment of the whole principle and interest under the loan agreement.

[11] In the circumstances, I hold that the defendants have succeeded in their plea of limitation and the plaintiff's claim is, therefore, statute-bar red and is accordingly dismissed with costs to be taxed unless agreed.

Order accordingly.

Reported by Mohd Nizam Hamdan